

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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from: Joseph Clark
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subject: Definition of Principal Residence For Purposes of Internal Revenue Code § 6334

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Taxpayer =

ISSUES

Whether pursuant to I.R.C. § 6334 a revenue officer must seek judicial approval prior to seizing a residence owned by a taxpayer, where the taxpayer is serving a lengthy prison sentence and is renting the home to an unrelated third party.

CONCLUSIONS

No. Treas. Reg. § 1.121-1(b) defines “principal residence” for purposes of I.R.C. § 6334. This regulation provides that a facts and circumstances should be applied to determine

whether a residence is a taxpayer's "principal residence." The "2-out-of-5 years" test is irrelevant in determining whether a home is a taxpayer's principal residence. Thus, even though the taxpayer in this case meets the requirements of the "2-out-of-5 years" test, an application of the facts and circumstances test reveals that the home owned by the taxpayer is not his "principal residence." Therefore, no judicial approval is required prior to seizing the home.

FACTS

A revenue officer seeks to seize a home that is owned by a taxpayer who is serving a lengthy prison sentence. The taxpayer, now residing in jail, lived in the home within the past 2 of 5 years. All of the taxpayer's correspondence is mailed to the prison. Additionally, the taxpayer now rents the home to an unrelated third party.

The amount of the deficiency in this case is not small. The levy would exceed \$5,000.

No judicial approval has been obtained to seize the taxpayer's residence. The revenue officer working on this case has inquired whether judicial approval is required prior to levying on the taxpayer's property.

LAW AND ANALYSIS

I.R.C. § 6334(a)(13)(A) prohibits the seizure of residential property where the amount of a levy does exceed \$5,000. Here, the levy exceeds \$5,000. Thus, I.R.C. § 6334(a)(13)(A) does not apply to bar seizure of the taxpayer's residential property.

I.R.C. § 6334(a)(13) and Treas. Reg. § 301.6334-1(a)(3)(ii) state that the principal residence of the taxpayer, "within the meaning of § 121," is exempt from levy unless the approval required by I.R.C. § 6334(e) is first obtained. Section 6334(e)(1) provides that the principal residence is not exempt from levy if a judge approves, in writing, the levy of such residence.

The meaning of the term "principal residence" under § 121 is found in Treas. Reg. 1.121-1. Specifically, § 1.121-1(b) provides a facts-and-circumstances test for determining (1) whether property is used by the taxpayer as the taxpayer's residence and (2) which property, if more than one is being used as the taxpayer's residence, is the taxpayer's principal residence. Section 1.121-1(b) provides, in part, as follows:

(b) *Residence - (1) In general.* Whether property is used by the taxpayer as the taxpayer's residence depends upon all the facts and circumstances. A property used by the taxpayer as the taxpayer's residence may include a houseboat, a house trailer, or the house or apartment that the taxpayer is entitled to occupy as a tenant-stockholder in a cooperative housing corporation. Property used by the taxpayer as the taxpayer's residence does not include personal property that is not a fixture under local law.

(2) *Principal residence.* In the case of a taxpayer using more than one property as a residence, whether property is used by the taxpayer as the taxpayer's principal residence depends upon all the facts and circumstances. If a taxpayer alternates between 2 properties, using each as a residence for successive periods of time, the property that the taxpayer uses a majority of the time during the year ordinarily will be considered the taxpayer's principal residence. In addition to the taxpayer's use of the property, relevant factors in determining a taxpayer's principal residence, include, but are not limited to:

- (i) The taxpayer's place of employment;
- (ii) The principal place of abode of the taxpayer's family members;
- (iii) The address listed on the taxpayer's federal and state tax returns, driver's license, automobile registration, and voter registration card;
- (iv) The taxpayer's mailing address for bills and correspondence;
- (v) The location of the taxpayer's banks; and
- (vi) The location of religious organizations and recreational clubs with which the taxpayer is affiliated.

In accordance with these regulations, revenue officers faced with a property seizure should first consider whether the property is the residence where the taxpayer spends a majority of his or her time. If necessary, the other factors identified above should be considered. For example, the taxpayer's mailing address may become an important factor if the taxpayer is not spending the majority of his time at any residence because he is incarcerated. The critical inquiry, for I.R.C. § 6334(e) purposes, is whether the property is the taxpayer's principal residence under Treas. Reg. § 1.121-1(b) at the time the levy is made.

Additionally, there has been some discussion about whether a "2-out-of-5-years" test should be applied to determine whether property is a taxpayer's principal residence. This test is based on the language of I.R.C. § 121(a), which provides that a taxpayer may exclude from gross income gain from the sale or exchange of property if, during the 5-year period ending on the date of the sale or exchange, the property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more. This 2-out-of-5-years test is used only to determine whether a taxpayer may exclude gain from gross income. The ability to exclude the gain from gross income is not relevant in determining whether judicial approval is needed for a levy. Thus, revenue officers should ignore the 2-out-of-5-years test when determining whether judicial approval is needed for a levy.

To illustrate, assume that Taxpayer (T) purchased Home # 1 in New York in January 1998, using that home as his principal residence until May 2000. Assume further that in June 2000, T moved out of Home # 1, renting it to an unrelated family, and moved his family to California to begin a new job. In July 2000, T purchased Home # 2 in California, moving his family into it and using it as his principal

residence. Finally, assume that in February 2001 the Service levied on both homes.

On these facts, judicial approval would be required to levy on Home # 2, because Home # 2 is T's principal residence at the time of the levy. It is irrelevant that T does not meet the 2-out-of-5-years test with regard to this property at the time of the levy. Contrastingly, judicial approval would not be required to levy on Home # 1, because Home # 1 is not T's principal residence under the facts and circumstances test when the levy is made. It is irrelevant that T meets the 2-out-of-5-years test with regard to this property and therefore could exclude the gain on the sale of this property.

Here, the taxpayer is incarcerated, not living at the residence, receiving all of his correspondence at the prison, and is renting the home to an unrelated third party. Thus, based on the facts and circumstances test, the residence is not the taxpayer's principal residence for purposes of I.R.C. § 6334(a)(13). The fact that the taxpayer meets the 2-out of-five years test with regard to this property is irrelevant. Therefore, the revenue officer is not required to seek judicial approval prior to levying on the taxpayer's property.

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